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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. KEVON TAKASHI ROSS, Defendant and Appellant.	B292274 (Los Angeles County Super. Ct. No. YA093449)

APPEAL from a judgment of the Superior Court of Los Angeles County, Scott T. Millington, Judge. Affirmed.

Law Offices of George L. Steele and George L. Steele for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted appellant Kevon Takashi Ross of first degree murder, numerous counts of rape and other sex offenses, and several other related offenses. The trial court sentenced him to a total of 275 years to life plus 11 years in prison. On appeal, appellant contends the court erred in: (1) denying his motion to exclude statements he made to police before he was advised of his *Miranda*[1] rights; (2) denying his motions to suppress evidence obtained following a warrantless search of his digital camera, and to traverse a subsequently obtained search warrant; (3) admitting insufficiently authenticated video evidence; and (4) ordering the disclosure of notes he had used to refresh his recollection on the witness stand, in violation of his attorney-client privilege. We reject his challenges and affirm.

BACKGROUND

A. *The Information*

In 2016, the Los Angeles County District Attorney's Office charged appellant with murder (Pen. Code,[2] § 187), two counts of willful infliction of corporal injury (§ 273.5, subd. (a)), and numerous counts of forcible rape (§ 261, subd. (a)(2)), rape of an unconscious person (§ 261, subd. (a)(4)), and other sex offenses. The information also included various sentencing enhancement allegations.

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1 *Miranda v. Arizona* (1966) 348 U.S. 436 (*Miranda*).

2 Undesignated statutory references are to the Penal Code.

B. *The Evidence at Trial*

1. *The People's Case-in-Chief*

a. *December 12, 2015, Rape and Murder of Kellie N.*

On December 12, 2015, around 5:11 a.m., Gardena Police Department Officer Steve Kim received an emergency medical-aid call indicating a woman was unresponsive at a nearby hotel. After Officer Kim arrived at the relevant hotel room and announced his presence, appellant opened the door and invited him inside. Inside the room, Officer Kim saw an unconscious woman, later identified as Kellie N., lying naked on the bed, with vomit on and around her face and bruising to her chest area. Kellie was not breathing and had no pulse. Officer Kim immediately began administering CPR and asked appellant how long Kellie had been unconscious. Appellant replied he had been sleeping and found Kellie unconscious when he woke up. After paramedics arrived and took over first-aid efforts, Officer Kim started questioning appellant in an attempt to obtain information that could assist their efforts. Appellant reported he and Kellie had drunk alcohol, had sex, and then went to sleep. He claimed he woke up to find Kellie unresponsive, with vomit around her face.[3]

Attempts to resuscitate Kellie ended at 5:46 a.m. Officers recovered a digital camera on a tripod, and two cell

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[3] Video from Officer Kim's body camera was played for the jury.

phones from the room.[4] They also found duct tape, rope, whips, and a mask. Appellant was taken to the police station and later placed under arrest. At that time, officers recovered a cell phone in his possession.

Officers obtained a search warrant for the content of appellant's electronic devices. Appellant's counsel later turned over a computer to the People, and a forensic analysis showed appellant was the computer's primary user. Appellant's devices contained video recordings of some of his encounters with women.

Videos of the December 12, 2015, incident, found on appellant's devices, were played for the jury. In the videos, Kellie could be seen wrapped in plastic wrap from head to toe, with only her breasts and nose exposed. Appellant then entered the screen and placed tape over her nostrils. Kellie could be seen struggling against the bindings and a muffled scream could be heard. Though her breathing was labored and obstructed, Kellie could still be heard breathing. Appellant went to another room, retrieved various instruments, and began hitting Kellie with them. According to Dr. Matthew Miller, the medical examiner who performed Kellie's autopsy, and who also watched the videos, Kellie began having apneic episodes -- temporary cessations of breathing -- likely because her brain was not getting enough

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[4] As discussed below, another officer examined the content of the digital camera and showed a still photo to other officers.

oxygen. Appellant started masturbating and later removed the tape from Kellie's nose.

After some time, appellant again applied tape to Kellie's nose and pressed down hard. The pitch of her breathing sound became much higher and according to Dr. Miller, her breathing movements indicated her body was making more forceful attempts to breathe. Shortly thereafter, appellant got on top of Kellie and had sexual intercourse with her, slapping and punching her face and breasts. A light-brown material could be seen next to Kellie's nose, and she appeared to be unconscious. According to Dr. Miller, this material appeared to be gastric fluid, which was consistent with the relaxation of Kellie's muscles in the process of dying, together with the pressure appellant placed on her wrapped abdomen.

After completing the autopsy and viewing videos of the incident, Dr. Miller ruled Kellie's death a homicide and determined that the cause of death was asphyxiation due to smothering. A review of videos from appellant's devices revealed another incident involving Kellie and led investigators to additional victims.

b. *November 21, 2015, Rape of Kellie N.*

On November 21, 2015, appellant and Kellie met at a hotel. There, appellant bound Kellie with a rope, placed a plastic bag over her head, and tied the bag down with a rope. At some point, Kellie sat up and said, "No," but appellant told her to lie back down. Kellie complied, and her breathing

became more labored. She later became unresponsive and made no movements other than gasping for air. About two minutes later, appellant had sexual intercourse with her. A video of the incident was played for the jury.

c. *October 2007 Rape of Jessica W.*

Jessica W. started dating appellant in October 2007. Jessica was very religious at the time and though the two were sexually intimate, she wanted to remain a virgin until she got married. She therefore made it clear to appellant that she was willing to have oral and anal sex with him, but not vaginal sex. Initially, appellant respected this limitation. However, later that same month, after binding Jessica and placing duct tape on her mouth, which was not uncommon for the couple, appellant proceeded to have vaginal intercourse with her. Jessica tried to push appellant off, yelled, "No," and started crying, but he would not stop.

d. *June 5, 2015, Rape of Brooke N.*

Brooke N. met and started dating appellant in April 2015. At some point, appellant introduced bondage and choking into the relationship. On June 5, 2015, Brooke went to appellant's residence. Appellant asked if she wanted a shot of tequila, and Brooke indicated she did. She had two shots of tequila and sat on appellant's bed. That is all she remembered from the evening. The next morning, Brooke felt sick and had bruises on her arms and legs. She later

went to an emergency room and was treated for pleural effusion, a collection of fluid around the lungs.

Police later showed Brooke pictures of herself in appellant's residence, taken from appellant's devices. In one of them, Brooke had a sheet around her neck. In another, there was a liquor bottle inside her vagina. In a third picture, Brooke was on the floor, her face was blue, and her eyes were glazed. In a fourth picture, there was a bag over her head. Brooke did not give appellant permission to do any of those things to her.

A video of the June 5, 2015, incident was played for the jury. It showed Brooke lying naked on the floor, with her hands bound behind her back. Her breathing was labored and she appeared to be unconscious. At various times during the video, appellant is shown to place duct tape over Brooke's nose and mouth, place a plastic bag over her head, stuff a sock into her mouth, insert a liquor bottle into her vagina, and have sexual intercourse with her.

e. *June 6, 2015, Infliction of Corporal Injury on Valeria G.*

Valeria G. met appellant in 2013, and the two later began dating. At some point, they introduced bondage into their relationship. On June 6, 2015, while the two were at appellant's bedroom, appellant insisted on hogtying Valeria

and hanging her up.[5] At trial, Valeria testified she remembered looking at appellant and wanting to say "no," but the next thing she remembered was being on the floor and "spitting up blood," as she had bit her tongue.

A video of the incident was played for the jury. It showed Valeria kneeling on an office chair with her hands bound and a rope around her neck. Appellant tied that rope to a pull-up bar, and Valeria said, "No, don't. You're not going to take the chair away, are you?" Appellant pulled the chair away and left Valeria hanging. Blood then started coming from Valeria's mouth onto her chest and she urinated herself. The bleeding increased and blood started dripping to the floor, and her body started fluttering.

f. *November 25-26, 2015, Rape of Valeria*

Valeria and appellant spent the night of November 25, 2015, and the morning hours of November 26 at a hotel. Appellant hanged Valeria from a pull-up bar. Valeria testified she remembered only waking up in bed later, with a towel underneath her. Valeria and appellant had previously established that if she became unconscious, he would take her down.

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[5] Valeria testified this incident occurred about a week before her June 15, 2015, college graduation. A video of the incident contained a time stamp with the date June 6, 2015. We discuss appellant's contention that this video was insufficiently authenticated below.

A video of this incident was played for the jury. It showed appellant pulling out a chair Valeria was standing on, as she was tied from her neck to the pull-up bar, despite Valeria saying, "No" numerous times. Her body began convulsing. Appellant began masturbating and then proceeded to have sexual intercourse with Valeria, as she remained hanging and appeared to be unconscious.

2. *Defense Evidence*

Appellant testified in his defense.[6] He claimed he believed that the victims were all conscious when he had sex with them, and that they had consented to all sex acts.

As to Kellie's death, appellant claimed it was an accident. He testified he met with Kellie to break up their relationship because he was getting serious with Valeria. Kellie was upset and wanted to have one last "scene" with him. She suggested doing a "mummification" and a "bagging." Appellant claimed he accounted for the need to breathe in wrapping Kellie and tested the wrapping before starting the scene. After about five minutes, appellant took the tape off Kellie's nose to check her breathing. She was still breathing, and he left the tape off for seven minutes.

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[6] Appellant also called two expert witnesses to testify about sexual activity involving bondage, discipline, sadism and masochism (BDSM), and one of those experts opined that appellant was involved in consensual BDSM relationships with the victims. Neither party's briefs mention these experts' testimonies, and they are not relevant to the issues on appeal.

After putting the tape back on, appellant checked to make sure Kellie was still breathing by observing an air pocket in the tape. He had no reason to believe she was not breathing. When appellant later saw that Kellie had vomited, he "freaked out," took off the tape and attempted to tear off the body wrapping. He then attempted to perform CPR, but realized he lacked the necessary training and therefore called 911.

3. *Rebuttal Evidence*

Sarah H. met appellant on Tinder in early December 2015. They texted and arranged to meet on December 10, 2015, the day before Kellie's death. The two met and had oral sex.

C. *The Verdict and Sentence*

After trial, the jury found appellant guilty as charged and found all sentencing enhancement allegations true. The trial court sentenced appellant to a total of 275 years to life plus 11 years in prison. Appellant timely appealed.

DISCUSSION

A. *Constitutional Challenges to the Evidence*

1. *Background*

Before trial, appellant filed a motion to suppress all photographic and video evidence seized from him, contending officers conducted an unconstitutional warrantless search by viewing the content of his digital

camera at the hotel room. He claimed evidence later derived from his computer and cellphones was excludable as fruit of the poisonous tree.[7] Alternatively, appellant moved to traverse the search warrant police later obtained for these devices, arguing the warrant affidavit included material misrepresentations.[8] Finally, appellant moved to suppress statements he made to police during his initial questioning outside his hotel room, before he received *Miranda* warnings, arguing he was subjected to a custodial interrogation.

The trial court held a joint hearing on all of appellant's motions. At the hearing, Officer Kim testified about the efforts of emergency personnel to save Kellie. According to Officer Kim, police officers were at the scene only to render aid. While Officer Kim began administering CPR, appellant repeatedly approached and tried to stand behind him, contrary to the officer's instructions that appellant wait outside. When assisting officers arrived, Officer Kim asked them to take appellant outside, and asked one of them to "keep an eye" on him. After paramedics arrived and took

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[7] "The fruit of the poisonous tree doctrine is an exclusionary rule that prohibits the introduction of evidence that is causally connected to an unlawful search." (*People v. Navarro* (2006) 138 Cal.App.4th 146, 157, fn. 6.)

[8] The warrant affidavit stated, incorrectly, that Kellie was wrapped in plastic wrap and duct tape when officers arrived at the scene, and did not note that officers had already viewed content on appellant's digital camera.

over CPR, Officer Kim exited the room to speak to appellant. Appellant was not physically restrained, and was never told he was not free to leave. Kim and other officers began asking appellant questions, seeking information that could assist the paramedics. They did not advise him of his rights under *Miranda*. Appellant was apparently looking at his cellphone while officers attempted to speak to him, so Officer Kim asked him to "stay off [his] phone for a minute." During appellant's questioning, which lasted less than 20 minutes, he was at times "sitting there by himself." In response to appellant's counsel's question, Officer Kim confirmed it was possible officers remained within about 10 feet of appellant.

While efforts to revive Kellie continued, one officer observed appellant's digital camera facing Kellie, and examined its content. That officer did not testify at the hearing. Video from Officer Kim's body camera, showing appellant's questioning, was played for the court. The officers' demeanor during their interaction with appellant was not confrontational, and they never suggested he was suspected of a crime. Officer Kim could be heard relaying information he obtained from appellant to the paramedics.

Following the hearing, the trial court denied all of appellant's motions. Regarding the motion to suppress appellant's statements under *Miranda*, the court concluded appellant was not subjected to a custodial interrogation, and thus that officers were not required to advise him of his rights. As to the motion to suppress digital evidence, the court concluded that the officers were responding to an

ongoing emergency, and that examining the content of appellant's camera was subject to the emergency aid exception to the warrant requirement. Finally, as to appellant's motion to traverse, the court found that any misrepresentation in the warrant affidavit was not material to the probable cause determination.

2. *Challenge to the Admission of Appellant's Statements to Police Before He Was Mirandized*

Under *Miranda*, *supra*, 384 U.S. 436, "'[b]efore being subjected to "custodial interrogation," a suspect "must be warned he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."'" (*People v. Leonard* (2007) 40 Cal.4th 1370, 1399-1400.) A person is in custody for purposes of *Miranda* only if he or she has been formally arrested or subjected to a "'restraint on freedom of movement' of the degree associated with a formal arrest." (*California v. Beheler* (1983) 463 U.S. 1121, 1125.) Thus, an officer generally may briefly detain a suspect and ask him "a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions" without providing any admonishment. (*Berkemer v. McCarty* (1984) 468 U.S. 420 (*Berkemer*).)

Absent a formal arrest, the relevant inquiry "is how a reasonable [person] in the suspect's position would have understood his situation." (*Berkemer, supra*, 468 U.S. at 442.) Relevant factors in conducting this inquiry include, inter alia: whether police or the person questioned initiated the contact; whether the express purpose of the questioning was to interview the person as a witness or suspect; the questioning's location; whether there were restrictions on the person's freedom of movement during the questioning; the length of the person's detention; and whether the officers were aggressive, confrontational, or accusatory. (See *People v. Bejasa* (2012) 205 Cal.App.4th 26, 36 (*Bejasa*); *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162.) No single factor is dispositive. (*Bejasa*, *supra*, at 35.)

"Whether a defendant was in custody for *Miranda* purposes is a mixed question of law and fact. [Citation.] 'When reviewing a trial court's determination that a defendant did not undergo custodial interrogation,' an appellate court accepts the trial court's findings of historical fact if supported by substantial evidence, but independently determines 'whether, given those circumstances,' the interrogation was custodial." (*People v. Kopatz* (2015) 61 Cal.4th 62, 80.)

We conclude appellant was not in custody for purposes of *Miranda* when he made the relevant statements. Appellant was not under arrest at the time. Nor do the relevant circumstances suggest his freedom of movement was restrained to a degree associated with formal arrest. It

is undisputed that appellant initiated the contact with police by calling 911 and inviting Officer Kim into his hotel room. The officers questioned appellant outside his hotel room, and he was never handcuffed or otherwise physically restrained. Appellant was never told he was not free to leave, and he was at times just "sitting by himself" without any officers in his immediate vicinity. Finally, the officers' demeanor was not confrontational, they never told appellant he was suspected of any crime, and circumstances surrounding his questioning showed the officers were trying to obtain information that could aid the efforts to revive Kellie.

Appellant disputes none of these facts. The only circumstances he notes in support of his contention that he was in custody for *Miranda* purposes are that he "was not free to use his cell phone," that officers "remained within 1-20 feet of [him]," and that Officer Kim asked another officer to "'keep an eye'" on him. Initially, we observe that it appears Officer Kim intended to stop appellant from repeatedly coming *into* the room, where first-aid efforts were ongoing, rather than to prevent him from leaving. Regardless, even assuming appellant was detained during his questioning, his detention was brief and did not include the indicia of arrest. A brief detention, without more, is insufficient to render a person in-custody for purposes of *Miranda*. (See *Berkemer*, *supra*, 468 U.S. at 442 [persons briefly detained in traffic stop are not "'in custody'" for purposes of *Miranda*]; *People v. Forster* (1994) 29 Cal.App.4th 1746, 1753-1754 [questioning of DUI suspect

during one-hour detention was not custodial interrogation].) Accordingly, the trial court did not err in denying appellant's motion to exclude his statements to police during his pre-*Miranda* questioning.

3. *Fourth Amendment Challenge to the Admission of Digital Evidence Derived from Appellant's Devices*

On appeal, appellant claims the trial court erred in denying his motion to suppress all digital media evidence based on the officers' initial viewing of the content of his digital camera. He claims the examination of the content of his camera violated his rights under the Fourth Amendment to the United States Constitution. When considering a Fourth Amendment suppression ruling on evidence obtained without a warrant, we review the trial court's factual findings for substantial evidence and its application of law to those facts de novo. (*People v. Thompson* (2010) 49 Cal.4th 79, 111.)

Appellant's argument on this issue is wholly inadequate. In his opening brief, he presents no analysis of the issue and makes no mention of the trial court's ruling that the need to provide emergency aid to Kellie justified the officers' warrantless search of his camera. Instead, after reciting the facts surrounding the officers' search of his digital camera, appellant simply states, "Because the searches of the hotel room and of the camera were conducted without a warrant, the evidence seized should have been

suppressed." Appellant's failure to develop the argument forfeits the issue on appeal. (See *Sviridov v. City of San Diego* (2017) 14 Cal.App.5th 514, 521 (*Sviridov*) [failure to present reasoned argument constitutes forfeiture].) His attempt to address the issue in his reply brief is too late to present the issue for our consideration. (Cf. *Browne v. County of Tehama* (2013) 213 Cal.App.4th 704, 726 [failure to raise argument in opening brief constitutes forfeiture].)

Moreover, were we to consider appellant's challenge to the trial court's denial of his motion to suppress, we would reject it. When a search "appears reasonably necessary to render emergency aid," that exigency excuses the warrant requirement, regardless of whether a crime might be involved. (*People v. Ovieda* (2019) 7 Cal.5th 1034, 1041 (*Ovieda*).) "This 'emergency aid exception' does not depend on the officers' subjective intent or the seriousness of any crime they are investigating when the emergency arises. [Citation.] It requires only 'an objectively reasonable basis for believing' [citation], that 'a person . . . is in need of immediate aid,' [citation]." (*Michigan v. Fisher* (2009) 558 U.S. 45, 47 (*Fisher*).)

It is undisputed that the officers arrived at appellant's hotel room in response to his 911 call reporting a medical emergency. Officer Kim testified that they were there only to render medical aid to Kellie, and that they questioned appellant in an attempt to get information that would assist the paramedics' efforts to revive her. Indeed, in video from his body-camera, Officer Kim could be heard relaying

information he obtained from appellant to the paramedics. Appellant, however, claimed ignorance as to the cause of Kellie's condition and stated (falsely) that he woke up to find her unconscious. Under these circumstances, it was entirely reasonable for the officers to examine the content of a camera facing Kellie for valuable clues about the cause of her medical emergency. The need to save Kellie's life therefore justified the officers' warrantless search of the content of appellant's camera. (See *Ovieda*, *supra*, 7 Cal.5th at 1041; *Fisher*, *supra*, 558 U.S. at 47; *United States v. Fifer* (7th Cir. 2017) 863 F.3d 759, 766 [where "a 16-year-old girl was found half-naked and hiding under a bed in the home of a convicted sexual predator" and failed to cooperate, it was objectively reasonable for police to search electronic devices in home for information to help identify victim and locate her family]; *United States v. Dunavan*, (6th Cir. 1973) 485 F.2d 201, 202-204 [no Fourth Amendment violation where officers attempting to assist unconscious man searched locked briefcase for information on his identity or physical condition].) Contrary to appellant's contention in his reply brief, this conclusion does not depend on the officers' subjective intent in conducting the search and therefore does not require testimony from the officer who performed it. (See *Fisher*, *supra*, at 47.)

Because appellant has shown no Fourth Amendment violation in the search of his camera, any evidence obtained as a result of that search does not constitute fruit of the poisonous tree. (*People v. Mendez* (2019) 7 Cal.5th 680, 700

["something 'cannot be "fruit of the poisonous tree" if the tree itself is not poisonous'"].) Accordingly, appellant fails to establish error in the trial court's denial of his motion to suppress.[9]

B. *Authentication Challenge to Video Evidence*

1. *Background*

Appellant challenges the admission of videos involving Brooke and Valeria, asserting they were insufficiently

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[9] Appellant asserts in conclusory fashion that the trial court erred in denying his motion to traverse the search warrant for his digital devices based on the alleged misrepresentations in the warrant affidavit. Because he fails to accompany this assertion with analysis or citation to authority, he has forfeited any contention in this regard. (See *Sviridov*, *supra*, 14 Cal.App.5th at 521.) Moreover, forfeiture aside, appellant cannot establish the claimed misrepresentations were material to the determination of probable cause. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1297 [defendant challenging warrant based on misrepresentations in affidavit must show misrepresentations were material to determination of probable cause].) For probable cause purposes, it would have made little difference if the warrant affidavit had accurately reported that video from appellant's camera showed Kellie had been wrapped in plastic wrap and duct tape, instead of incorrectly stating that officers had found Kellie in that condition.

authenticated.[10] Before trial, appellant filed a motion in limine to exclude these videos for lack of foundation.

As relevant here, at the hearing on the motion, the prosecutor summarized the evidence that would be presented about the retrieval of the videos from appellant's devices, the time stamps in the videos, and the victims' expected testimonies regarding the different incidents. The prosecutor stated that Brooke would identify herself in the video of the June 2015 incident involving her, but that Valeria preferred not to see the videos involving her again. The trial court denied appellant's motion as to the videos involving Brooke but took under consideration whether Valeria would have to view the videos at court to authenticate them.

At trial, Jake Gibson, a prosecution investigator, explained how he measured the accuracy of time stamps on the videos from appellant's different devices. His analysis showed that one device's time stamps were entirely accurate while other devices' time stamps were within about one hour of the correct time.[11] Gardena Police Department Detective Mike Sargent testified that he had shown Brooke still photos

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[10] The People presented no videos to support the charge relating to Jessica, and appellant does not contest the authenticity of videos involving Kellie.

[11] As for videos found on appellant's computer, Gibson was able to determine which of appellant's devices recorded each video using the video's file name, which was generated by the recording device.

taken from the video of the June 5, 2015, incident involving her, and that he had shown Valeria the video of the November 2015 incident involving her. At a sidebar during Valeria's testimony, the trial court informed the prosecutor that it would not require Valeria to watch the November 2015 video, and she could instead testify that she had identified herself in it when Detective Sargent showed it to her. Valeria then testified she had recognized appellant and herself in the November video.

The prosecutor did not question Valeria about the video of the June 6, 2015, incident. Instead, he elicited testimony about the incident itself: Valeria testified about an incident that occurred about a week before her June 15, 2015, college graduation, in which appellant hogtied her and hung her up her from her neck in his residence, and the next thing she remembered was "spitting up" blood because she had bit her tongue. She described appellant's bedroom, including a poster on the wall, the closet's sliding doors, and the arrangement of appellant's computer and television. The information Valeria provided closely matched the video of the June 6, 2015, incident. Thus, at a sidebar conference with counsel, the trial court stated that Valeria's testimony sufficiently authenticated this video. Brooke later testified that the photos Detective Sargent showed her (taken from the video of the June 5, 2015, incident) depicted her.

2. *Analysis*

On appeal, appellant argues the trial court should not have admitted the videos involving Valeria and Brooke because they were unauthenticated. To be admissible in evidence, a video recording must be authenticated. (See *Jones v. City of Los Angeles* (1993) 20 Cal.App.4th 436, 440, fn. 5.) The proponent of the video must provide prima facie evidence that would permit a reasonable trier of fact to find that the video "is a fair and accurate representation of the scene depicted." (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266, 267 (*Goldsmith*).) "This foundation may, but need not be, supplied by the person taking the photograph or by a person who witnessed the event being recorded. [Citations.] It may be supplied by other witness testimony, circumstantial evidence, content and location." (*Id.* at 268.)

We review a trial court's determination of authenticity for abuse of discretion. (*Goldsmith*, *supra*, 59 Cal.4th at 266.) "[W]e will not disturb the trial court's ruling 'except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*Ibid.*)

The relevant videos were all taken from appellant's devices. At trial, Gibson, the prosecution investigator, confirmed the accuracy of the videos' time stamps within about an hour of the correct time. Detective Sargent testified he had shown Brooke still photos taken from the video of the June 5, 2015, incident, and Brooke testified she had identified herself in those photos. Similarly, Detective

Sargent testified he had shown Valeria the video of the November 2015 incident, and Valeria testified she had identified appellant and herself in that video. As for the video of the June 6, 2015, incident involving Valeria, Valeria testified about an incident that occurred around the same time, in which appellant hogtied her and hung her up from her neck in his residence, and after which she was bleeding, as she had bitten her tongue. She described appellant's bedroom in relative detail. The information Valeria provided closely matched the time, setting, and events depicted in the video. No evidence suggested any of the videos were not genuine. The People therefore presented sufficient prima facie evidence of the videos' authenticity. (See *Goldsmith*, *supra*, 59 Cal.4th at 269; *People v. Gibson* (2001) 90 Cal.App.4th 371, 383 [writings authenticated as belonging to defendant by content (defendant's alias and details corroborated by other evidence), location (in defendant's residence), and absence of evidence they were written by anybody else]; *People v. Valdez* (2011) 201 Cal.App.4th 1429, 1435 [photo posted on social-media page authenticated by content (matched defendant's appearance), circumstantial evidence (same page included messages addressed to defendant by name or relation), and absence of evidence that photo was not genuine].)

Appellant does not address the testimony used to authenticate each video or attempt to explain why it was insufficient. Instead, he argues generally: "If the victims were indeed unconscious, their respective states of

unconsciousness would render them incapable of having personal knowledge of events that occurred while they were unconscious as is required by Evid[ence] Code [section]701 (…the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter.). Unless the victims can demonstrate that they were aware of the recordings being made at a particular place, on a particular date, and at a particular time, there is no way to determine when and where the recordings were made and they cannot be authenticated for the People's intended purpose." We disagree.

Evidence Code section 701 has no application here, as neither Brooke nor Valeria testified about what appellant had done to them while they were unconscious. As noted, a video need not be authenticated by a person who witnessed the recorded events. (*Goldsmith*, *supra*, 59 Cal.4th at 268.) And no rule prevents a victim from identifying her unconscious body in a video or from providing information about the events before and after she was rendered unconscious to demonstrate the video's authenticity and establish the time and location at which it was recorded. The trial court did not abuse its discretion in finding the videos had been sufficiently authenticated.[12]

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[12] Appellant argues conclusorily that the People failed to establish a chain of custody for his computer, asserting that because it "was found in a trash can in southern California" the People could not prove the videos were not edited or altered before authorities obtained them. Initially, appellant has
(*Fn. is continued on the next page*.)

C. *The Disclosure of Appellant's Notes*

1. *Background*

Appellant was the last defense witness. On two occasions during his direct examination, appellant referred to a packet of 24 pages of notes he brought to the stand with him, to refresh his recollection as to a date or location. During a break in appellant's testimony, the prosecutor asked for copies of appellant's notes under Evidence Code section 771. That provision provides, inter alia, that documents used to refresh a witness's recollection during or before the witness's testimony must be produced on an adverse party's request.[13] Appellant's counsel objected,

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forfeited any contention in this regard by failing to support it with a reasoned argument and citation to authorities. (See *Sviridov*, *supra*, 14 Cal.App.5th at 521.) Moreover, the record shows that appellant's counsel turned appellant's computer over to the People pursuant to a search warrant, and there is no support for the claim it was found in a trash can. A forensic analysis showed appellant was the computer's primary user. Appellant's bare speculation that the videos might have been edited or altered did not require the court to refuse to admit them. (See *People v. Diaz* (1992) 3 Cal.4th 495, 559 ["'when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight'"].)

[13] As relevant here, Evidence Code section 771 states: "(a) . . . [I]f a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so (*Fn. is continued on the next page*.)

arguing that appellant's notes were protected by lawyer-client privilege. After reviewing the notes in camera, the court ruled that six of the 24 pages must be disclosed, finding that appellant had waived the privilege by using the notes to refresh his recollection. The court therefore provided that portion of appellant's notes to the People. As to the other 18 pages, the court stated they concerned appellant's "strategy in defense with regards to evidence," and found that disclosing them would be unfair to him.

2. *Analysis*

Appellant challenges the trial court's disclosure of his notes to the People, arguing it violated the lawyer-client privilege and as a result, his constitutional right to counsel. Respondent counters that (1) appellant has forfeited this challenge by failing to include these notes in the record on appeal, (2) the lawyer-client privilege was inapplicable to them, (3) appellant waived any privilege by using the notes to refresh his recollection during his testimony, and (4) any error in the trial court's order was harmless beyond a reasonable doubt. We agree that appellant has forfeited his

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produced, the testimony of the witness concerning such matter shall be stricken.

"(b) If the writing is produced at the hearing, the adverse party may . . . inspect the writing, cross-examine the witness concerning it, and introduce in evidence such portion of it as may be pertinent to the testimony of the witness."

challenge to the trial court's order by failing to include the disclosed notes in the record on appeal.

"'It is the duty of an appellant to provide an adequate record to the court establishing error. Failure to provide an adequate record on an issue requires that the issue be resolved against appellant. [Citation.]'" (*Hotels Nevada, LLC v. L.A. Pacific Center, Inc.* (2012) 203 Cal.App.4th 336, 348 (*Hotels Nevada*).) "This principle stems from the well-established rule of appellate review that a judgment or order is presumed correct and the appellant has the burden of demonstrating prejudicial error." (*Ibid.*) Issues raised without an adequate appellate record for us to evaluate them are therefore deemed forfeited. (*Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003 (*Pringle*).)

Appellant's failure to include his disclosed notes in the record is not a mere breach of a legal technicality -- it makes it impossible for us to review his claim. We cannot decide if the lawyer-client privilege applied to the disclosed notes, as appellant maintains, without reviewing their content.[14] Similarly, assuming the privilege applied, we cannot decide without reviewing the notes whether Evidence Code section 771 nevertheless permitted their disclosure. When a witness

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[14] For example, if the content of the disclosed notes showed that they were unrelated to any communication between appellant and his counsel, the lawyer-client privilege would not apply to them. (See Evid. Code, § 954 [lawyer-client privilege applies only to "confidential communication[s] between client and lawyer"].)

uses privileged material to refresh his or her recollection, the trial court may order the disclosure of such material under Evidence Code section 771 to the extent necessary to allow effective cross-examination. (See *People v. Smith* (2007) 40 Cal.4th 483, 509 (*Smith*).) In *Smith*, a case involving the psychotherapist-patient privilege, our Supreme Court affirmed a trial court's order requiring disclosure of a defense-retained psychologist's privileged materials used to refresh the expert's recollection before his testimony. (*Ibid.*) Relying in part on Evidence Code section 771, the Court concluded compelling the disclosure was not an abuse of discretion because without the privileged materials, "the prosecution may not have been able to cross-examine [the expert] effectively." (*Smith*, *supra*, at 509.) We cannot apply this standard to appellant's notes without knowing their content and relation to his testimony.[15] Appellant has therefore forfeited his challenge to the trial court's disclosure of his notes. (See *Hotels Nevada*, *supra*, 203 Cal.App.4th at 348; *Pringle*, *supra*, 73 Cal.App.4th at 1003.)

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[15] *Sullivan v. Superior Court* (1972) 29 Cal.App.3d 64, cited by appellant in support of his argument that the lawyer-client privilege precluded disclosure of his notes despite his use of them on the stand, is inapposite. (See *id.* at 67, 72 [plaintiff need not produce transcript of her recorded interview by her attorney, despite having refreshed her recollection by listening to recording, because transcript of such client-attorney conference did not constitute "writing" that must be disclosed under Evid. Code § 771].)

Moreover, even were we to assume the trial court erred in ordering the disclosure, and further assume the error implicated appellant's constitutional right to counsel, the compelled disclosure was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [federal constitutional error that was harmless beyond reasonable doubt does not require reversal].) Appellant's notes were disclosed to the People during the cross-examination of appellant, the last defense witness. The prosecutor did not offer them into evidence, and appellant does not contend the prosecutor used them in any way. The disclosure of appellant's notes therefore could not have prejudiced his defense. Accordingly, we reject appellant's challenge to the trial court's disclosure of his notes to the People.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, P. J.

We concur:

COLLINS, J.

CURREY, J.